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No. 93-1916

In The

Supreme Court of the United States

October Term, 1993

STEVEN L. ROSA (Deceased), CHRISTINA ROSA, JOSHUA ROSA, AMBER ROSA and NATHANIEL ROSA,

Petitioners,

vs.

WARNER ELECTRICAL CONTRACTING, COLORADO COMPENSATION INSURANCE AUTHORITY and THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Colorado

BRIEF IN OPPOSITION

MICHAEL J. STEINER
Attorney for Respondent Colorado Compensation Insurance Authority
North Tower, Suite 100
720 South Colorado Boulevard
P.O. Box 241305
Denver, Colorado 80224-9305
Telephone: (303) 782-4100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether a state statute which reduces workers' compensation benefits by the amount of Social Security benefits received is preempted by the Social Security Act even though there is no indication of a congressional intent to preempt state law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

OPINION BELOW..... 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT..... 2

CONCLUSION..... 8

TABLE OF AUTHORITIES

Page

CASES

Barnes v. District of Columbia, 611 F. Supp. 130 (D.D.C. 1985) 6

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) 4

Freier v. New York Life Insurance Co., 679 F.2d 780 (9th Cir. 1982) 5

Harris v. State Department of Labor and Industries, 843 P.2d 1056 (Wash. 1993) 5, 7

Hurd v. Illinois Bell Telephone Co., 136 F. Supp. 125 (N.D. Ill. 1955) 4, 5

Lamb v. Connecticut General Life Ins. Co., 643 F.2d 108 (3rd. Cir. 1981), *cert. denied*, 454 U.S. 836 (1981) 5

Lessard v. Metropolitan Life Ins. Co., 568 A.2d 491 (Me. 1989) 5

Maryland v. Louisiana, 451 U.S. 725 (1981) 3

McClanathan v. Smith, 186 Mont. 56, 606 P.2d 507 (1980) 5

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 4

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983) 3

Pennsylvania Medical Society v. Marconis, 942 F.2d 842 (3rd Cir. 1991) 7

Poisson v. Allstate Life Ins. Co., 640 F. Supp. 147 (D. Me. 1986) 5

TABLE OF AUTHORITIES – Continued

Page

Pyke v. Department of Social Services, 453 N.W.2d 274 (Mich. App. 1990) 5, 7

Raskin v. Moran, 684 F.2d 472 (7th Cir. 1982) 6, 7

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) ... 3, 8

Rosa v. Warner Electrical Contracting, 870 P.2d 1210 (Colo. 1993) 1

Stuart v. Metropolitan Life Ins. Co., 664 F. Supp. 619 (D. Me. 1987), *affirmed*, 849 F.2d 1534 (1st Cir. 1988), *cert. denied*, 488 U.S. 968 (1988) 5

STATUTES AND REGULATIONS

28 U.S.C. § 2857 2

42 U.S.C. § 403(f)(3) 6

Section 8-42-114, C.R.S. 2

Section 8-50-103, 3B C.R.S. (1986) 2, 8

MISCELLANEOUS

1975 Colo. Session Laws, ch. 271, p. 299 2

Tribe, *American Constitutional Law* (1988), p. 497 4

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BRIEF IN OPPOSITION

OPINION BELOW

The Colorado Supreme Court ruled, at 870 P.2d 1210 (Colo. 1993) that the state statute did not violate the Social Security Act.

JURISDICTION

Respondents concede that the petitioners have timely sought certiorari pursuant to 28 U.S.C. § 2857.

STATEMENT OF THE CASE

This case involves the Colorado Workers' Compensation Act, which requires offsets against the benefits of the dependents of deceased workers if the dependents receive survivors' benefits from Social Security or a workers' compensation program of another state or of the federal government. Section 8-50-103, 3B C.R.S. (1986), now found at section 8-42-114, C.R.S. This provision has been in the Act since 1975. 1975 Colo. Session Laws, ch. 271, p. 299.

Petitioners are the widow and children of Steven Rosa, who died while working for Warner Electrical Contracting. They receive Social Security survivors' benefits, which were offset against their Workers' Compensation benefits pursuant to section 8-50-103, 3B C.R.S. (1986).

REASONS FOR DENYING THE WRIT

Petitioners have asked that the court grant a writ of certiorari to resolve the issue of whether, under the doctrine of implied preemption, federal law precludes the amount of benefits paid to Social Security recipients from being offset against some other benefits to which the recipients are entitled. The petition fails to mention the Colorado Supreme Court's thorough review of this issue.

The petition also fails to mention *any* preemption case decided by this court, despite the substantial case law in this area. Finally, the petition fails to acknowledge a long line of cases over nearly 40 years in which courts have upheld offsets of Social Security benefits.

Analyses of federal preemption issues begin with "the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725 (1981). Where Congress legislates "in a field which the states have traditionally occupied" courts will not apply preemption unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

There are several ways to show congressional intention to preempt state law. Congress can, of course, expressly declare that the states are precluded from legislating in an area of law. Petitioners have not claimed that any express language exists anywhere in the Social Security Act to prohibit states from offsetting Social Security survivors' benefits against workers' compensation benefits.

If Congress does not expressly preclude state legislation, preemption can still be found under the doctrines of implied preemption or conflict preemption, which are explained in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 203-204 (1983). Preemption will be implied if the federal regulatory scheme is so pervasive or the federal interest is so dominant that state law must be assumed to

be precluded. This is sometimes referred to as a congressional intent to "occupy the field." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985).

Under conflict preemption, state laws must fall if compliance with both federal and state law is "a physical impossibility" or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The preemption doctrine is rarely used to strike down state legislation. There must be " . . . persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). As Professor Tribe has said, " . . . state action is preempted only if it specifically frustrates fairly narrow and concrete objectives that underlie federal enactments . . . " but there is no preemption merely because a state law " . . . is in general tension with broad or abstract goals that may be attributed to various federal law or programs." Tribe, *American Constitutional Law* (1988), p. 497.

Petitioners have argued that the offset statute is invalid because it "decreases the value of the recipient's Social Security award." However, that argument has been rejected in a long line of cases going back to 1955, in which courts have upheld offsets of Social Security benefits. The first case was *Hurd v. Illinois Bell Telephone Co.*, 136 F. Supp. 125 (N.D. Ill. 1955). The plaintiffs in that case argued that a reduction of pension benefits was an improper assignment of benefits because it would cause "a corresponding shift in the economic benefit of the

Social Security payment . . . " *Id.* at 141. That is precisely the same argument made in the case at bar.

The court rejected this argument and ruled that the Social Security Act "was never intended to freeze a worker's private pension at a particular level." *Id.* at 142.

In reaching this result, the court carefully examined the legislative history of the Social Security Act. The court concluded that when the Act was first enacted and later amended there was "no doubt" that Congress was well aware that offsets would be taken and did not intend to invalidate offsets. *Id.* at 142-143, 148-149. *Hurd* was affirmed by the Seventh Circuit at 234 F.2d 942 (7th Cir. 1956).

Many other courts have reached the same result. *See Freier v. New York Life Insurance Co.*, 679 F.2d 780 (9th Cir. 1982); *Lamb v. Connecticut General Life Ins. Co.*, 643 F.2d 108 (3rd. Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *Stuart v. Metropolitan Life Ins. Co.*, 664 F. Supp. 619 (D. Me. 1987), *affirmed*, 849 F.2d 1534 (1st Cir. 1988), *cert. denied*, 488 U.S. 968 (1988); *Poisson v. Allstate Life Ins. Co.*, 640 F. Supp. 147 (D. Me. 1986); *Harris v. State Department of Labor and Industries*, 843 P.2d 1056 (Wash. 1993); *Pyke v. Department of Social Services*, 453 N.W.2d 274 (Mich. App. 1990); and *Lessard v. Metropolitan Life Ins. Co.*, 568 A.2d 491, 499 (Me. 1989).

Petitioners are correct that the ruling in *McClanathan v. Smith*, 186 Mont. 56, 606 P.2d 507 (1980) is generally consistent with their theory even though it involved disability benefits, rather than survivors' benefits. In that case the court concluded that an offset statute " . . . is in total opposition to federal legislation, in that it deprives a

claimant of benefits provided by Social Security legislation . . . " However, the court offered no explanation whatever for its ruling.

Petitioners rely more heavily on *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982), which involved a Wisconsin statute on the salaries of retired judges who continued on the bench. The statute provided that the judges' salaries were reduced dollar for dollar by the amount of their Social Security retirement benefits. The judges argued that the statute was preempted by 42 U.S.C. § 403(f)(3), which provides that the retirement benefits of recipients who are 70 years old or older will not be reduced by their earned income. The court held that although the offset did not directly affect the judges' Social Security benefits, the effect of the Wisconsin statute was "the functional equivalent" of such a deprivation and it represented "a clear frustration" of the purpose of the "quite apparent underlying goals of the federal statute." *Id.* at 479, 480.

Respondents do not concede that *Raskin* was decided correctly. It is also easily distinguished. Section 403(f)(3) sets forth a clear intent to encourage recipients of *retirement* benefits to work. There is no such intent in the Act to encourage duplications of *survivors'* benefits from various income maintenance programs.

Since 1982, when *Raskin* was decided, only four cases have cited it on the preemption issue. In no case was it followed.

Barnes v. District of Columbia, 611 F. Supp. 130 (D.D.C. 1985) involved retired military officers who worked for District of Columbia. Their salary was reduced dollar for dollar by the amount of their retirement benefits. They

argued that this offset was preempted by a federal statute that salaries of military retirees who worked for the federal government were not reduced. The court ruled that "the plaintiffs misconceive the role of the Supremacy Clause in serving as a check on local legislation." The court distinguished *Raskin* because the statute at issue had no "clear goal of protecting federal benefits", as did the statute in *Raskin*.

Raskin was distinguished on the same basis in *Harris v. State Department of Labor and Industries, supra*. That case involved a reverse offset of retirement benefits. The court said that in contrast to *Raskin* and the statute involved in that case, there was no "clear evidence of congressional intent to preempt state reverse offsets of federal social security retirement benefits. We decline to infer preemption from Congress's silence."

In *Pyke v. Department of Social Services, supra,* the court also distinguished *Raskin* on the ground that it was based on express statutory intent that federal payments not affect the receipt of other payments.

In *Pennsylvania Medical Society v. Marconis,* 942 F.2d 842 (3rd Cir. 1991), the plaintiffs ruled that a Pennsylvania statute limiting the amounts doctors could charge Medicare recipients was not preempted by the Medicare statute, which is Title XVIII of the Social Security Act. *Raskin* was cited in dissent.

CONCLUSION

Petitioners concede that no specific language in the Social Security Act prohibits offsetting survivors' benefits against workers' compensation benefits. No case has ever prohibited an offset of survivors' benefits.

There is no question that workers' compensation has traditionally been handled by the states, rather than by the federal government. Therefore, preemption will not apply unless that is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp., supra.* Petitioners have offered no evidence of any such purpose.

Section 8-50-103, C.R.S. (1986) does not conflict with the Social Security Act. The petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. STEINER
Colorado Compensation
Insurance Authority
North Tower, Suite 100
720 South Colorado Boulevard
P.O. Box 241305
Denver, Colorado 80224-9305
Telephone: (303) 782-4100

Attorney for Respondent
Colorado Compensation Insurance
Authority